No. 15,493

IN THE

United States Court of Appeals

For the Ninth Circuit

FRED BRIDGES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF OF APPELLEE.

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Subject Index

Table of Authorities Cited

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JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28, United States Code.

STATEMENT OF THE CASE.

Appellant was indicted in Criminal No. 33917 in three counts for violation of the narcotic laws of the United States. The first count charged a violation of the Harrison Narcotics Act by selling heroin. The second count charged that at the same time and place appellant violated the Jones-Miller Act by concealing heroin. The fifth count of the indictment[1] charged the

[1]Appellant was indicted with a man named Nayland Jackson who was named alone in the third and fourth counts of the indictment.

appellant and Nayland Jackson with conspiracy to sell and conceal heroin.

On May 26, 1954 appellant withdrew his plea of not guilty to the indictment in the following manner:

"Mr. Sullivan. As far as this particular indictment is concerned, I desire to withdraw the plea of not guilty heretofore entered for the purpose of presenting a new and different plea as to the first two counts.

The Court. The Court will accept the plea, there being no objection on your part?

Mr. Foster. No objection.

The Clerk. In case 33817, Fred Bridges, do you withdraw your former plea of not guilty to counts one, two and three of this indictment?

Defendant Bridges. Yes.

The Court. The plea is "yes"; guilty?

Mr. Sullivan. As to his——

The Clerk. Withdrawal. What is your plea, Fred Bridges, to counts one and two of this indictment, guilty or not guilty?

Defendant Bridges. Guilty.

Mr. Sullivan. Same transaction.

The Court. The other counts may be dismissed. You have had the advice of your attorney, Mr. Sullivan, in this matter, have you?

Mr. Sullivan. Yes, Your Honor. Talked to him.

Defendant Bridges. Yes, Judge, Your Honor, I understand I am pleading to one count.

Mr. Sullivan. One transaction. Well, it is one transaction, Mr. Bridges. It is simply as I told you before—two different statutes, that's all.

The Court. There isn't any question in his mind?
Mr. Sullivan. No, not at all, Your Honor."

Prior to appellant's sentence the Court was informed of the appellant's prior record, which included sentences for assault with intent to commit murder and burglary, and arrest for assault, burglary, robbery, narcotics, vagrancy, gambling, and suspicion of assault with a deadly weapon. (Tr. 5.) In addition, the Court was informed that while appellant was on bail from the instant charge he had committed another narcotic offense in violation of the laws of the State of California (Tr. 5-6).[2] On June 16, 1954, almost a month later, appellant was sentenced. The Court prior to sentencing inquired directly of appellant: "Are you ready for sentence?" The defendant answered: "Yes, Your Honor." (Tr. 14.) Appellant was then sentenced to 5 years on the first count charging a violation of the Harrison Narcotics Act in that appellant sold heroin, and to a term of 5 years on the second count of the indictment charging the concealment of the heroin referred to in the first indictment, and the terms of imprisonment were ordered to run consecutively (Tr. 14). Appellant at that time made no statement of any kind, nor did his retained counsel, concerning the consecutive sentences received. The Court then dismissed a second indictment numbered 33918 against the defendant charging a violation of the narcotic laws. On May 17, 1955 appellant's first motion to vacate sentence under Section 2255 of Title 28 United States Code was denied by Judge Harris.

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[2]Tr. references refer to the Transcript of the proceedings on Plea No. 10 in the Record.

Appellant did not appeal from the denial of this motion. On January 14, 1957, almost three years after the appellant was sentenced, the instant motion under Section 2255 was filed. On February 17, 1957, with appellant represented by counsel, appellant's motion to vacate was denied. Appeal is made from this order.

QUESTIONS PRESENTED.

1. Was the Court required to entertain a second motion for relief under Section 2255?

2. May there be consecutive sentences for the concealment of heroin and the sale of that heroin when the first sentence is imposed under the Jones-Miller Act and the second sentence is imposed under the Harrison Narcotics Act?

3. Was appellant deprived of due process of law in his plea of guilty and his sentence thereupon?

ARGUMENT.

I.

APPELLANT MAY RECEIVE CONSECUTIVE SENTENCES FOR THE CONCEALMENT OF HEROIN AND THE SALE OF THE SAME HEROIN CONCEALED.

Appellant was sentenced to five years imprisonment on the first count of the indictment which charged him with a violation of the Harrison Narcotics Act. This count charged that appellant on the 7th of January, 1954, in Oakland, California "did sell, dispense and

distribute not in or from the original stamped package" approximately 12 grains of heroin. On the second indictment he was sentenced to a term of five years to run consecutively to the five years he received under the first count of the indictment. The second count of the indictment charged him with concealing and facilitating the concealment of approximately 12 grains of heroin at the same time and place as charged in the first count of the indictment. The first count charged a violation of the Harrison Narcotics Act, 26 U.S.C. 2553 and 2557, and the second count of the indictment charged a violation of the Jones-Miller Act, 21 U.S.C. 174. Appellant contends that he received double punishment because the inference is that the 12 grains of heroin referred to in the first count of the indictment also were involved in the second count of the indictment. It is appellant's claim that proof of the two counts of the indictment would have involved the identical evidence and hence would constitute but one criminal offense subject to but one penalty.

The Supreme Court has heretofore considered the contention that sale and possession of contraband can constitute but one single offense. In *Albrecht v. United States,* 273 U.S. 1, the appellant was convicted of both sale of liquor and possession of liquor. The Supreme Court held, however, as follows:

> "The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinctive offenses. One may obviously possess without selling; and one

> may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possesses does not render the possession and the sale necessarily a single offense. There is nothing in the constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

In *Blockburger v. United States,* 248 U.S. 299, the Supreme Court held to the same effect in a case involving the narcotic laws, involving but one transaction. There the Court announced a general rule that the test to be applied is to be determined whether there were two offenses or only one is whether each requires proof of a fact which the other does not. This Court has also ruled many times adversely to the position taken here by appellant.

Gargano v. United States (9th Cir.), 140 F.2d 118;

Bruno v. United States (9th Cir.), 164 F.2d 693, cert. den.;

Toliver v. United States (9th Cir.), 224 F.2d 742.

Here the evidence, of course, supporting count one would not have been identical with the evidence supporting count 2. To prove count one, evidence would necessarily have to establish that appellant sold narcotics. Furthermore, appellant could have sold the

heroin without ever having concealed it or facilitated the concealment thereof.

II.

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS BY HIS PLEA OF GUILTY AND HIS SENTENCE.

Section 2255 in its terms provides that "a court may entertain and determine [a motion under Section 2255] without requiring production of the prisoner at the hearing." Where it appears from the motion, file, and records in the case that prisoner is entitled to no relief, then no Findings of Fact and Conclusions of Law are required by the Court.

> *Birtch v. United States* (4th Cir.), 173 F.2d 316.

It would destroy prison discipline to put the election of travel in the hands of prisoners serving a sentence.

> *Carvell v. United States* (4th Cir.), 173 F.2d 340.

As the Court stated in *Crowe v. United States,* 175 F.2d 799 at 801:

> "Only in very rare cases, we think, will it be found necessary for a court to order a prisoner produced for a hearing under 28 U.S.C.A. Sec. 2255. Certainly, whether or not the court should require him to be brought into court for the hearing is a matter resting in the court's discretion. Production of the prisoner should not be ordered merely because he asks it, but only in those cases

> where the court is of opinion that his presence will aid the court in arriving at the truth of the matter involved . . .''

In the *Crowe* case appellant had claimed that he had been tricked by one of his attorneys. The Court, however, held that the prisoner there should have raised the question at the time of his original trial and at the time of sentence here as there as the Court stated ''the matter set forth by the motion as grounds for relief were matters which could have been raised in the proceeding in which the sentence was imposed.'' In the instant case appellant was asked almost a month after he first raised some question concerning his plea whether he had anything to say before sentence. He answered ''No.'' His counsel at the time of his plea informed the Court that he had already discussed the matter of a plea to two counts of the indictment with appellant. Furthermore, appellant's retained counsel actually withdrew his plea of not guilty by indicating that appellant desired to plead to two counts of the indictment. Appellant did not raise any question at the time of his sentence or afterwards until the present motion, which was brought more than two years after judgment. As the court stated in *Bloombaum v. United States* (4th Cir.), 211 F.2d 944: ''If he had any defense to the charge he should have presented it at the time.'' In *United States v. Lowe* (2d Cir.), 173 F.2d 346, the petitioner there charged that a promise of probation had induced his plea of guilty. The court held, however, that he should have protested at the time of sentence.

Appellant had numerous chances before now to raise the issue of his claimed lack of knowledge of his plea to two counts of the indictment. He could have discussed the matter with his probation officer. He could have raised the question prior to sentence on June 16. He could have made some statement of complaint immediately after sentence was pronounced. He could have made a motion to modify within 60 days of his sentence under Rule 35 of the Federal Rules of Criminal Procedure. However, he did none of these things. He made no complaint concerning his sentence until almost three years after judgment. As a matter of fact he even neglected to raise the point on his first motion to reduce sentence under Section 2255.

III.

THE COURT WAS NOT REQUIRED TO ENTERTAIN APPELLANT'S SECOND MOTION.

It appears that appellant applied for relief under Section 2255 of Title 28 on a prior occasion. The District Court denied this motion on May 17, 1955. It does not appear that appellant appealed from this denial. The court in its order on the first motion indicated that the appellant here applied for relief on the grounds that he had received double punishment. This, of course, is the almost identical ground on which he claims relief in the present motion. Section 2255 provides that "The sentence court shall not be required to entertain a second or successive motion for relief on behalf of the same prisoner." This court in *Win-*

hoven v. Swope (9th Cir.), 195 F.2d 181-183, has held that a court is without jurisdiction to entertain a successive motion for relief. See also *Winhoven v. United States* (9th Cir.), 221 F.2d 793. The District Court here was clearly not required to do more than it did, namely, give appellant through his counsel and by means of the motion, files and records in the case, an opportunity to present his position. This the Court did and then denied the motion. Section 2255 was designed in part to avoid the problems of repetitious writs for habeas corpus. Clearly, one of the reasons for the enaction of Section 2255 was to minimize the time waste caused by the relitigation of cases which have theretofore received exhaustive judicial attention. See *Hayden v. Swope,* 342 U.S. 205 at pages 212 through 219. See also *Madigan v. Wells* (9th Cir.), 224 F.2d 577. Cert. denied.

CONCLUSION.

Because appellant had been previously denied relief under Section 2255 the Court was not required to entertain his motion, but even considering the motion on its merits it was properly denied. The judgment of the District Court should be affirmed.

Dated, June 21, 1957.

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